

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76- 1431

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1473

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

JOSE COLON RODRIQUEZ,

Defendant-Appellant.

BRIEF AND APPENDIX ON BEHALF OF APPELLANT

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Of Counsel

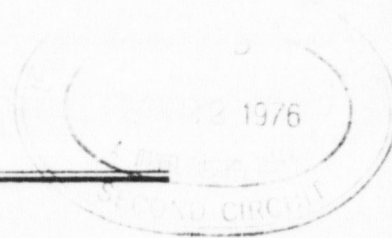


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X

UNITED STATES OF AMERICA,

Appellee,

Docket No. 76-1473

-against-

JOSE COLON RODRIQUEZ,

Defendant-Appellant.

----- X

BRIEF ON BEHALF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York, rendered September 20, 1976, convicting appellant and others of Unlawfully Distributing and Possession with Intent to Distribute a Controlled substance, in violation of Title 21 U.S.C., Sections 812, 841(a)(1), 841 (b)(1)(A) and Title 18 U.S.C. Section 2.

Appellant was sentenced to one year's imprisonment, of which nine months was suspended, plus three years probation.

This action was tried to a jury from July 20th through July 22nd, 1976, Hon. Milton Pollack presiding. At the end of the trial the Court dismissed the conspiracy count against all of the defendants, and appellant was convicted of the fifth count of the indictment.

A notice of appeal was duly filed and appellant was continued on bail pending appeal by the District Court.

STATUTES INVOLVED

21 U.S.C. Section 841 Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance ...

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than \$50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

18 U.S.C. Section 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

FACTS

The original theory of the government was that appellant, the other co-defendants, and one, MARTINEZ, who was not on trial, conspired to and did actually sell narcotics on four occasions. However, the only actual sale or possession charge was made in the fifth count, and allegedly occurred on April 28, 1976. The Court dismissed the conspiracy count, so that the only charge that was submitted to the jury was the alleged sale which occurred on April 28th.

Detective HORACE DALTON BALMER, a New York City detective, said that he took \$1,800.00 and on February 20, 1976 went with other agents to East Houston Street and Ludlow Street in Manhattan. They spoke to an informant, and thereafter he parked his car between Avenue A and Avenue B (21-22). The informant left and thereafter returned bringing MARTINEZ back, who was introduced to the police. The witness told MARTINEZ that he wanted to buy heroin, and was told that he would have to go with him. They went to Avenue D near 8th Street. MARTINEZ went into a bar and they thereafter drove to 10th Street and Avenue B (26-27). They parked the car, the informant remained inside and the witness and MARTINEZ went into 247 East 10th Street, to the fourth floor, and into an apartment which MARTINEZ opened with a key. There was a girl about twenty-five years old in the apartment, and in the kitchen MARTINEZ sold two plastic bags of heroin to BALMER for \$1,800.00 (29-30),

The detective also testified to a similar incident on February 26th, when he bought two plastic bags from MARTINEZ for \$3,600.00.

The transaction occurred in a similar manner with the informant being present, and it occurred in the same apartment (33-38). During this transaction, there apparently was an argument, when MARTINEZ' brother-in-law came into the apartment, and after he left the kitchen there was \$200.00 missing (40-41). At any rate, the next day, February 27th, the detective had himself wired, and they went back into the area where he purchased the narcotics. He saw MARTINEZ and the female who resided in the apartment. MARTINEZ was on the street carrying groceries, going toward the apartment (47). They had a conversation on the street. MARTINEZ apologized about the \$200.00 and said he would make it up by charging \$200.00 less on the next deal (48-49). The conversation was taped and was played for the jury, as was a telephone conversation between the same two men. The officer then testified about another purchase which was made at MARTINEZ' residence on Delancey Street near Columbia Street in a city housing project (60-61). MARTINEZ' wife was in the apartment at the time. They entered MARTINEZ' bedroom. MARTINEZ took the knob off the door, put it in his pocket, took a jewelry box out of the closet (62-63). There were stacks of money in the box and also plastic envelopes containing powder. He took three envelopes out, weighed them and sold the narcotics to Detective BALMER (63-64). Detective BALMER then testified about the incident which occurred on the 28th of April, which was really the only substantive count involved in this indictment. BALMER said he called MARTINEZ and met him at the same place with \$12,000.00 to make the transaction (65-66).

MARTINEZ said that he was waiting for his connection and it would take a little time. He took Detective BALMER across the street and introduced him to a man leaning on a car as his brother who was there to make sure everything went smoothly. That man was VASQUEZ (67-68). He then met Mr. ALGARIN (71), and there was a discussion about the narcotics purchase. MARTINEZ, in fact, asked the witness if he had the money. In fact, they went into a hallway to count the money, and then the suggestion was that they go next door into a club which was known as the Yabucoa Club (8A *). They went inside and were in the back room of the club when MARTINEZ, VASQUEZ and ALGARIN apparently completed the transaction. MARTINEZ and BALMER counted the money. The purchase was apparently four ounces for \$6,800.00. BALMER took the money out and MARTINEZ said everything was okay (10A-11A). Then MARTINEZ told BALMER to wait, the man would be there shortly, so BALMER put the money back in the trunk of his car. Later on, about 4:20, he saw MARTINEZ and ALGARIN again and also Mr. RODRIQUEZ was present (12A-13A). When he saw MARTINEZ he gave him the high sign. MARTINEZ came over and told him to be patient, everything was okay. Then MARTINEZ went back to where he had been standing on the street and spoke to the appellant, although no testimony was adduced concerning the nature of the conversation (13A). Then they all went into the social club. Another person, who was never identified, gave the detective a plastic bag and told him it was the best heroin he ever had in his life. This apparently happened in the back room and MARTINEZ and appellant were present (15A). BALMER put the heroin under his belt and

* References with letter "A" are to Appendix.

told him he had to go to the trunk of his car to get the money (15A). As he started to walk out of the back room, the appellant put his hands on BALMER's chest, pushed him back and said words to the effect that BALMER wasn't going anywhere and was not leaving the club (16A). That alleged statement of the appellant was his total involvement in this crime. BALMER turned to MARTINEZ and told him that the money was in the trunk, how was he going to pay for it if he didn't get to the trunk. MARTINEZ and appellant got into a conversation in Spanish, and while they were talking, the witness went out of the club and went to the trunk of his car. He gave a signal to the back-up police and all of the parties were then arrested (16A).

On cross-examination, BALMER said that there was no real attempt to stop him from leaving the premises and that the unknown individual who actually gave him the heroin was never apprehended (19A). In addition, when the appellant put his hands on his chest and tried to stop him from leaving the club, that was the first time he and appellant ever spoke (23A). The location of the incident was at the doorway to the back room. BALMER was facing the street and the appellant was facing the rear (25A).

Other detectives took the witness stand to corroborate BALMER's testimony with respect to the various meetings that took place, the meetings with the informant and the movements of BALMER which occurred prior to April 28th when he purchased narcotics, and in which appellant was not involved. The only other evidence of significance in the government's case with respect to this appellant was that another

detective, ANGEL RODRIQUEZ, said that after the arrest he took some keys from MARTINEZ and appellant said that the keys belonged to him, that they were for a bar that he ran at a different location (17A-18A).

Detective DANIEL KLOPFER also said that appellant told him the keys were his and that they were for another bar (26A-27A).

Another detective corroborated that appellant had been standing on the street talking to MARTINEZ in the undescribed conversation shortly before they went into the club (28A), and that basically constituted the government's case.

Motions made at the end of the government's case were denied and thereafter two of the defendants, VASQUEZ and the appellant each testified in his own behalf.

The appellant, JOSE COLON RODRIQUEZ, testified and said that he had been a resident of New York, was married and had been a licensed cab driver for twelve years (29A). He had been a manager of a John's Bargain Store and he had many other jobs before he became the manager of the Riverbend Bar. He has lived in the United States since 1960 with his wife and two daughters and had never been arrested in his life (31A). On April 28, 1976, he went into his bar to check things and then left to mail some envelopes (32A). He went into a restaurant for a short time and then came out and met MARTINEZ on the street. MARTINEZ had been a customer in his bar, but at that time they had not seen each other for about two months. They talked for a while and then went into the Yabucoa Club. Appellant went to buy a beer and as he was doing this, a man came out of the back room.

who he later knew to be Detective BALMER, and pushed into him. Appellant said, "What's going on?" and he testified that that was the only conversation between the two men (34A-35A). He also said that he never knew or met VASQUEZ and that he was arrested on the street in the middle of the block on Avenue B between 10th and 11th Streets. He was alone at the time (36A).

After the arrest, while he was being processed, they took his keys. Appellant said the keys were never in the possession of MARTINEZ. He never gave the keys to MARTINEZ and he has possession of the keys at all times. In fact, he did not even see MARTINEZ that day until they all went to sleep that night in jail (37A). He also said he never had a conversation with BALMER after he was arrested (37A).

On rebuttal, the government recalled Detective ANGEL RODRIQUEZ, who testified that while in the squad car on the way to the precinct, ALGARIN said to MARTINEZ, "I hope they don't find the keys" (39A). Appellant, who was also in the car then apparently said to MARTINEZ, "I told you the black guy was a shrimp" (39A) (Appellant had denied on cross-examination that he ever made that statement 38A). Detective RODRIQUEZ also testified that in street talk the word "shrimp" means cop (39A).

Both sides rested and the Court dismissed the conspiracy charge. The Court also told the jury to disregard the conspiracy evidence. The Court told the jury the only thing they were concerned with was the substantive count relating to April 28, 1976. After the jury began to deliberate, they requested certain testimony to be re-read, but the

only portion that concerned the appellant was that they had Detective ANGEL RODRIQUEZ' rebuttal testimony re-read concerning the conversation in the car (351). The jury also said that they wanted to know about the time involved between the arrest of the other defendants and VASQUEZ, and it is wondered whether or not they really meant VASQUEZ, since appellant was the one who said he had been arrested out on the street (354).

At any rate, the jury convicted appellant and ALGARIN and acquitted VASQUEZ (357).

POINT I

THE EVIDENCE ADDUCED AT THE TRIAL WAS
INSUFFICIENT AS A MATTER OF LAW TO
SUSTAIN THE CONVICTION AGAINST
APPELLANT. THERE WAS NO SHOWING THAT
HE AIDED AND ABETTED IN THE COMMISSION
OF THE CRIME CHARGED.

This case presents a rather simple factual pattern, and one which the appellant believes stretches to the limits the doctrine of aiding and abetting. The rules governing these situations have always been easy to state and clear to discuss in the abstract. When it comes to applying particular factual patterns to these principles, the difficulty appears.

In this case the conspiracy count was dismissed by the Court prior to submission of the matter to the jury, so that the only thing we are concerned with is the aiding and abetting doctrine and its application to the facts of this case and the ruling of law previously established. It has always been established that a person must associate

himself willingly with the illegal venture in order to be guilty by means of aiding or abetting. United States v. Barlow, 470 F.2d 1245 (D. C. Cir. 1972); United States v. Anthony, 474 F.2d 770, (5th Cir. 1973); United States v. Johnson, 513 F.2d 819 (2nd Cir. 1975); United States v. Paglia, 190 F.2d 445 (2nd cir. 1951); United States v. Dellaro, 99 F.2d 781 (2nd Cir. 1939); Roth v. United States, 339 F.2d 863 (10th Cir. 1964).

The question of knowledge is one of the important issues in determining whether one has aided the commission of a crime because all Courts have agreed that mere presence at the scene of a crime is insufficient alone. United States v. Williams, 341 U.S. 58 (1951); United States v. Wisniewski, 474 F.2d 274 (2nd Cir. 1973); United States v. Irons, 475 F.2d 40, cert. den. 412 U.S. 951 (8th Cir. 1973); United States v. Gloria, 494 F.2d 477, reh. den. 496 F.2d 878, cert. den. 95 S.Ct. 306 (5th Cir. 1974); United States v. Carengella, 198 F.2d 3, cert. den. 344 U.S. 881 (7th Cir. 1972); United States v. Minieri, 303 F.2d 550, cert. den. 371 U.S. 847 (2nd Cir. 1962). It is not permitted to infer guilt merely by association with a guilty person. United States v. Johnson, 513 F.2d 819 (2nd Cir. 1975); United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974); United States v. Prieto, 505 F.2d 8 (9th Cir. 1974).

Since mere presence or association is insufficient to show aiding and abetting, the question is what additional factors are necessary. The cases have held that associating willingly with the venture is a required element. In fact, there are cases which show that presence

plus knowledge alone is not sufficient. United States v. Garguilo, 310 F.2d 249 (2nd Cir. 1962). From a reading of the authorities it would seem safe to say that the proposition governing this area requires one to willingly participate in the commission of the crime or to consciously assist in its commission, and that some specific act must be committed by the person consciously with the objective of the parties. In other words, mere presence at the scene of a crime plus knowledge are not sufficient unless the person charged with aiding and abetting does something which is unambiguous and which directly points to the commission of the crime and the ends sought to be achieved. It is contended that a specific act consciously committed which is unambiguous must be found in addition to knowledge plus presence. United States v. Garguilo, supra; United States v. Terrell, 474 F.2d 872 (2nd Cir. 1973); United States v. Dickerson, 408 F.2d 1216 (2nd Cir. 1975); United States v. Wiley, 492 F.2d 547 (D.C. Cir. 1973); United States v. Anthony, supra; United States v. Wiebold, 507 F.2d 932 (8th Cir. 1974); Roth v. United States, supra. In United States v. Dickerson, supra, this Court held that a defendant could not be convicted of a crime unless he personally participated in its commission. The degree of participation necessary need only reach the level of aiding or abetting, but even then it was held that it must be proven that the defendant " . . . consciously assisted the commission of the specific crime in some active way." United States v. Dickerson, supra at 1218. It was held that the assistance involved had to be committed in furtherance of the objective of the parties to

bring about a certain illegal purpose. This idea can be found in other cases decided by this Court. That is that there must be conduct which on a case by case basis must clearly be directed to achieve the illegal objective. In Dickerson, the defendants were convicted of assaulting a federal officer, an assault which arose out of an attempt to sell a machine gun to the officer. In that case, the appellant actually approached the agent and offered to sell him the gun for \$500.00. The transaction took place in the back seat of a car. It seems that an argument, in which appellant did not participate, ensued over the gun and the Court held that the appellant could not be held responsible for the fight in which he did not participate. The conduct of the appellant was not conduct which was specifically in furtherance of the plan to sell the gun because there obviously had been no plan to assault the officer and the assault was merely a ramification of the plan which could not reasonably have been foreseen.

Likewise, in United States v. Terrell, supra, the same principles of law were recognized, including the idea that the conduct necessary was conduct that showed a willing participation in the plan in which the person willingly sought by some act on his part to make the plan succeed. It is also clear that the act necessary must be unequivocal and direct and more than just some conduct of any nature. Thus, as the Court in discussing United States v. Steward, 451 F.2d 1203 (2nd Cir. 1971), pointed out, the chauffeur of a car which carried a drug seller and his wares to a motel, would normally not, in and of itself, be liable to conviction on the basis of aiding and abetting, since there

there was no showing of the chauffeur's actual constructive possession of the drugs. This would be different than a situation where the chauffeur might have exclusive control over a vehicle in which the secreted drugs had been found or where delivery was made in an automobile over which the chauffeur had control, rather than merely being the driver of the car.

In United States v. Garguilo, supra, this Court also required specific action in holding that merely being with a person who was committing a crime was not enough. The Court said at page 253:

"Yet, even at an age when solitude is so detested and 'togetherness' so valued, a jury could hardly be permitted to find that the mere furnishing of company to a person engaged in crime renders the companion an aider or abettor."

It was clearly shown that the action necessary was action to make the scheme succeed, such as the attendance of a 250-pound bruiser at a shakedown as a companion to the extortionist or the maintenance of a lookout at the scene of a crime. In that case, the defendants were charged with making the likeness of a ten-dollar bill in violation of Federal statutes and the Court discussed the type of action necessary. Thus, if the defendant had carried the negative or made deliveries or taken some affirmative action totally consistent with the scheme to counterfeit, there would be no question that he would be guilty of aiding and abetting. Of course, in that case the conviction was affirmed, but it is submitted that the discussion in the opinion clearly shows the type of conduct which is required.

It is submitted that the facts of the case at bar are not consistent with the discussions in Garguilo, Terrell and the other cases which set the standards for conduct required for one to be an aider or abettor. Fortuitous meetings with people engaged in the commission of crimes or accidental appearances on the scene are not sufficient to sustain a conviction unless it can be shown that the appearances were planned and were part of the scheme to violate the law. The evidence in this case detailed four different meetings with the undercover officer, and except for the appellant's presence at the scene of the last transaction, he was not involved in any way in any of the prior events. The government witness described a sophisticated series of meetings, telephone calls, informant introductions and other conduct which resulted in the first three purchases of narcotics. Appellant was not present on any occasion, and in no way assisted the sales, had no conversations with the officer and could not basically be said to have in any way been connected with these transactions. In fact, the incident at the club on the last occasion was the first time the officer had ever spoken to or had anything to do with the appellant (23 A). Shortly before that incident, the officer had seen appellant on the street talking to one of the participants, but since that conversation was not heard, there is absolutely no reason to even infer that it in any way referred to narcotics. The appellant was a manager of a bar, and one of the participants, MARTINEZ, had been a customer in that bar. A conversation between them apparently related to why MARTINEZ had not been around in a while. At any rate, there is nothing in this record

to indicate the nature of that conversation and it has to be totally disregarded because it is not capable of any sinister interpretation. The only evidence in the entire case is that when the police officer testified he was leaving the back room of the club, appellant put his hands on him in an attempt to stop him and said that he wasn't going anywhere (16A). A further conversation between appellant and MARTINEZ occurred in Spanish, and since there was no translation of it, it must be disregarded.

Appellant testified that he never used such language, but that he was in the club to buy a beer and the police officer came running out and bumped into him. All he said was "What's going on?" (34A-35A). It is interesting to note that even according to the police officer's testimony, when the incident happened, the officer was facing the front of the club and appellant was facing the rear of the club (25A). The relative positions of the two men is equally consistent with appellant's explanation as it is with the officer's testimony.

Appellant testified that he had been a licensed cab driver for twelve years, he had an unbroken work record and that he lived in this country for a considerable length of time with his wife and children. He had never been convicted of a crime, and it seems that his testimony should have weighed enough so that a reasonable doubt was created as a matter of law, since the facts of this case are so terribly close. It is speculation of the most tentative kind to convict a man of so serious a crime based upon the testimony of a police officer alone of so fleeting an occurrence. Appellant was arrested later on on the street. There

was no showing that he was a partner of the other defendants and there is absolutely no evidence that he in any way associated himself with the plan to sell narcotics. When one considers the testimony of the officer at face value, the conclusion must be reached that there is no evidence that appellant knew narcotics were being sold. There is no evidence that appellant willingly associated himself with the illegal scheme and there is no evidence that appellant was anything more than a bystander on the occasion of the commission of a crime, which crime was unknown to him. Even if appellant had told the officer he wasn't going anywhere, that language is so ambiguous that it is equally suspect of an innocent interpretation, such as the desire of one to step into an argument and try to assist an acquaintance. The police officer was obviously not in uniform and there is no proof that appellant even knew who he was. Of course, one might argue that the statement of the appellant at the time was suspect, but it is contended that that is as far as one can go in drawing an inference of criminality.

It is suggested that the keys which were found after the arrest had nothing to do with this case and that the statement made by appellant that he said the officer was a cop means nothing either (). Even if that statement, testified to in the rebuttal portion of the government's case, was true, it could have related to a time after the incident took place and cannot supply the governing evidence necessary to show that appellant consciously and willingly associated himself with the scheme, that he had a stake in its outcome or that he acted to specifically further the illegal transaction. This case is more like

the Dickerson case, where this Court said that the assault could not have been reasonably contemplated and been committed in furtherance of the unlawful venture to sell machine guns. No one knew the officer would suddenly try to leave the back room, but the transaction that he described came about suddenly and was unforeseen. Had the officer not tried to leave, it would have to be recognized that appellant would not have in any way participated in the sale described in this transaction, and he merely would have been someone standing at the threshold to the room. It could not seriously be contended in that event that he would have been guilty in this case, since the statement made by the appellant was prompted by the action of the officer. It would seem that it was unforeseen and unplanned.

It is most respectfully submitted that based upon the evidence in this case that a sufficient amount was not adduced to sustain the conviction beyond a reasonable doubt.

CONCLUSION

THE CONVICTION SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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OFFENSE NO
OFFENSE MO
OFFENSE MA
OFFENSE CA

0848

01-RODRIGUEZ, JOSE COLON

05 04 76 0445

x 0208 01

04

76-541

21:846
21:812,841

Comp. to viol. Fed. Narco. Laws.
Dist. & possession of Heroin, I.

10
Secured with \$1,500c
4/30/76

KEY DATES

4/30/76
4/28/76

5-4-76

13-76

7-19-76

7-19-76

7-22-76

5-13-76

7-19-76

7-22-76

MAGISTRATE

4/29/76

5/7/76

MDJ-080B

4/29/76 MDJ-080B

21 USC 812,841(a)(1),841(b)(1)(A) and 846 - NARCOTICS

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New York, N.Y. Sp 7-1650

BEST COPY AVAILABLE

01-MARTINEZ, 02-VAZQUEZ, 03-ALGARIN

4/29/76

Complaint filed, represented by Alexander Spitzer, Esq.
Defendant released until 4/30/76 to make \$10,000 PRB secured with \$2,000 cash.

4/30/76

On application of defendant's attorney, Alexander Spitzer, bail reduced to \$10,000 PRB secured with \$1,500 cash, defendant released on bail, address: 756 FDR Dr., New York, N.Y., depositor: Carmen Colon Rodriguez, same address.

5/4/76

Indictment filed, 76 Cr. 445

5-13-76

Deft. (Atty present) enters a not guilty plea. Bail be continued as fixed \$10,000. P. R. B. secured by \$1,500. Cash. Case assigned to Judge Pollack.

05-17-76

Filed documents forwarded by Magistrate Jacobs:

05-17-76

4-29-76 complaint filed.

Filed notice of appearance of atty. Alexander Spitzer.

7/19/76

Pre trial before Pollack, J.

07-20-76

Deft. (atty. present) jury trial begun before Judge Pollack.

07-21-76

Trial cont'd. Ct. 1 dismissed.

07-22-76

Trial cont'd and concluded. Deft. found guilty as charged on ct. 5. Deft. cont'd. on present bail and given to 7-27-76 at 3PM. to post an additional \$1,000. cash bail.

P.S.I. ordered. For sent. 9-20-76 at 2PM. room 506. Pollack, J.

Wyatt, J.

- 07-27-76 Filed Appearance Bond in the sum of \$2,500.00.
- 9-20-76 Filed Judgment (Atty Lester Yudenfriend,) The deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment on count 5 for a term of ONE (1) YEAR, and on condition that deft. be confined in a JAIL TYPE institution for a period of THREE (3) MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended and the deft. is placed on Probation for a period of THREE (3) YEARS, subject to the standing probation order of this court. Title 18, Section 3651, U.S. Code. Pursuant to the provisions of Title 21, U.S. Code, Section 241, the deft. is placed on Special Parole for a period of THREE (3) YEARS to commence upon expiration of confinement. The Special Parole is to run CONCURRENTLY with the term of probation. Deft. advised of his right to appeal. Deft. is continued on present bail pending appeal.....POLLACK, J.
Issued all copies.
- 9-30-76 Filed Notice of Appeal to USCA from judgment of 9-20-76.
Mailed copies to us. attorney and Deft. at 765 P.D.R. Drive, NYC
- 10-12-76 Filed notice the record of appeal has been certified and transmitted to the U.S.C.A.

ml
-rev

UNITED STATES OF AMERICA

3a

- v -

INDICTMENT

GERARDO MEDINA MARTINEZ,
a/k/a "Junior", PEDRO VAZQUEZ,
WILLIAM ALGARIN, and JOSE COLON
RODRIGUEZ,

76 Cr.

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, GERARDO MEDINA MARTINEZ, a/k/a "Junior", PEDRO VAZQUEZ, WILLIAM ALGARIN, and JOSE COLON RODRIGUEZ, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about February 20, 1976, the defendant GERARDO MEDINA MARTINEZ, while in an apartment at 347 East 10th Street, New York, New York, sold to an undercover

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approximately one ounce of heroin for \$1800.

2. On or about February 26, 1976, the defendant GERARDO MEDINA MARTINEZ, while in Apartment 20 at 347 East 10th Street, New York, New York, sold approximately two ounces of heroin for \$3200.

3. On or about March 12, 1976, the defendant GERARDO MEDINA MARTINEZ stated that his brother would be arriving from Chicago the following week with three hundred ounces of heroin.

4. On or about March 12, 1976 the defendant GERARDO MEDINA MARTINEZ, while in Apartment 130 at 10 Columbia Street, New York, New York, sold approximately one and one-half ounces of heroin for \$1800.

5. On or about April 26, 1976, the defendants GERARDO MEDINA MARTINEZ, WILLIAM ALGARIN and PEDRO VAZQUEZ, while in the vicinity of East 11th Street and Avenue L, New York, New York, had a meeting to discuss the delivery of some heroin.

6. On or about April 28, 1976, at which time the defendant WILLIAM ALGARIN was present, the defendant PEDRO VAZQUEZ told the defendant GERARDO MEDINA MARTINEZ to count money to be received as payment for a sale of heroin.

7. On or about April 28, 1976 the defendants GERARDO MEDINA MARTINEZ and WILLIAM ALGARIN met with JOSE COLON RODRIGUEZ.

8. On or about April 28, 1976, while in the premises at 11th Street and Avenue L, New York, New York, the defendant JOSE COLON RODRIGUEZ stated that no one should leave those premises until money was delivered in payment for a quantity of heroin.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges: 5 a

On or about the 20th day of February, 1976 in the Southern District of New York, GERARDO MEDINA MARTINEZ, a/k/a "Junior", the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one ounce of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT THREE

The Grand Jury further charges:

On or about the 26th day of February, 1976, in the Southern District of New York, GERARDO MEDINA MARTINEZ, a/k/a "Junior", the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two ounces of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FOUR

The Grand Jury further charges:

On or about the 12th day of March, 1976, in the Southern District of New York, GERARDO MEDINA MARTINEZ, a/k/a "Junior", the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one and one-half ounces of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

On or about the 28th day of April, 1976, in the Southern District of New York, GERARDO MEDINA MARTINEZ, a/k/a "Junior", PEDRO VAZQUEZ, WILLIAM ALGARIN, and JOSE COLON RODRIGUEZ, the defendants, unlawfully, intentionally

and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately four and one-half ounces of heroin.

6 a

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

Catharine (Hoop)
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

1 jbesb

Balmer-direct

2 A Yes, I did.

3 Q Would you tell the ladies and gentlemen of the
4 jury when that was and how that happened?

5 A Mr. Vazquez came over and first spoke with Mr.
6 Martinez.

7 Q Where were you at this time?

8 A I was standing in the same proximity of 170
9 Avenue B.

10 Mr. Martinez asked me did I have the money. I
11 told him I did. I told him everything was okay and the
12 money was -- I could collect the money.

13 Mr. Vazquez asked Mr. Martinez had he checked
14 it. Then Mr. Martinez come to me and asked me, said, "Let's
15 count the money."

16 Q Mr. Vazquez asked Mr. Martinez?

17 A "Have you checked?"

18 Q Had Mr. Martinez checked what?

19 A The money.

20 Q At which point Mr. Martinez --

21 A Walked over to me and says, "I want to count the
22 money. Let's see the money."

23 Q What did you do?

24 A I went over to my car and I told Mr. Wright to
25 give me the money out of the trunk.

1 jbesb Balmer-direct

2 Q Did he do that?

3 A Yes, he did.

4 Q After he got the money out of the trunk, what
5 happened?

6 A He gave me the money and I went in -- Mr.
7 Martinez directed me into the hallway -- there is a
8 hallway at 170 -- to count the money, but it was so
9 cramped and no place to put the money down, I told him, I
10 said, "I can't count the money here."

11 He said, "Okay, let's go next door into the
12 club."

13 That is at 172. I believe it is called the
14 Yabucoa Club.

15 Q Now, when you went into 170 on the first time,
16 who entered the hallway with you?

17 A Okay. Myself and Mr. Martinez entered the
18 hallway.

19 Q Did anybody say anything to anybody else?

20 A Yes.

21 Q Who said what to whom?

22 A All right. Mr. Martinez said, "Cover the
23 entrance."

24 Q Who did he say that to?

25 A He was talking to Mr. Algarin and Mr. Vazquez.

jbesb

Balmer-direct

1
2 Q And Mr. Wright entered?

3 A I spoke to Mr. Wright.

4 Q What did you say?

5 A I told him to cover me.

6 Q Okay. When you entered, did you see Mr.

7 Vazquez and Mr. Algarin or Mr. Wright --

8 A All three of them was in front of the door of
9 170.

10 Q What were they doing?

11 A Covering myself and Mr. Martinez.

12 MR. TABACOFF: Objection.

13 THE COURT: What is the objection?

14 MR. TABACOFF: It is calling for a conclusion --
15 "covering Mr. Martinez and myself."

16 THE COURT: You can inquire into that on
17 cross-examination.

18 Go ahead. That is the testimony.

19 Q Now, you said you then left the hallway and
20 started entering 172.

21 A That's correct.

22 Q When you entered the club, did anybody enter
23 with you?

24 A Yes.

25 Q Who?

1 jbesb Balmer-direct

2 A Myself and Mr. Martinez.

3 Q Did anybody else enter the door?

4 A In the doorway. People stood in the doorway,
5 that's correct.

6 Q Where was Detective Wright?

7 A In the doorway.

8 Q Where was Mr. Vazquez and Mr. Algarin?

9 A In the doorway.

10 Q Did anybody say anything to them before you
11 entered?

12 A Before I entered? No.

13 Q Where did you and Mr. Martinez go?

14 A Went all the way to the rear of the club and
15 in the back; went to the rear of the club, in a separate
16 room.

17 Q What did you do in the rear of the club?

18 A All right --

19 Q You can return to your seat at this time.

20 A When we got to the room in the rear, I began to
21 count, to count the money.

22 Q Was Mr. --

23 A After I counted out --

24 Q Who were you with when you counted?

25 A I am with Mr. Martinez.

1 jbesb Balmer-direct

2 Okay. After I counted out the money and
3 exhibited the money to Mr. Martinez -- okay, I was counting
4 out, I had to count out four \$1700. I was buying four
5 ounces. So that is \$6800.

6 So I counted out the \$6800 from this \$12,000
7 I had, put the rest back. Soon as I finished counting the
8 money, Mr. Vazquez hollered to the back was everything
9 all right and Martinez says, "Everything is everything."

10 Q What did you understand "everything is
11 everything" to mean?

12 A That is street jargon meaning that the same is
13 okay, everything is okay.

14 Q Was that used in connection with the narcotics?

15 A Quite often.

16 Q After Mr. Martinez said, "Everything is
17 everything," what happened?

18 A We left out of the club and Mr. Martinez told me
19 to wait there, be patient, the man would be there shortly.

20 Q What did you do with the money?

21 A Put the money back in the trunk.

22 Q Did you open the trunk?

23 A No. I gave it to Mr. Wright. He put it back in
24 the trunk.

25 Q Was Detective Wright operating as an undercover

jbesb

Balmer-direct

1 agent just like yourself at that time?

2 A He certainly was.

3 Q After Detective Wright put the money in the
4 trunk, where, if anyplace, did Vazquez, Algarin and Martinez
5 go?
6

7 A Mr. Vazquez went towards 11th Street and --
8 well, we stood there for a few minutes. Like, they were
9 behind me when I was putting the money into the trunk.
10 They didn't just leave right away after coming out of the
11 social club. Okay?

12 Q Yes.

13 A But then Mr. Vazquez went towards 11th Street
14 and Mr. Algarin and Mr. Martinez went towards 10th Street.

15 Q Did Mr. Vazquez walk north on B?

16 A That's correct, and the others walked south.

17 Q Directing your attention to approximately 4:20,
18 did you have occasion to see Martinez and Algarin again?

19 A Yes.

20 Q Did you see anybody else at that time?

21 A Yes.

22 Q Who?

23 A Mr. Rodriguez.

24 Q Do you see Mr. Rodriguez in the courtroom
25 today?

jbesb Balmer-direct

A Yes.

Q Point him out.

A He is the gentleman sitting beside Mr. Vazquez wearing a grey suit, a multicolored shirt, basically grey and red.

THE COURT: Is the identification conceded?

MR. SPITZER: Yes, your Honor.

Q What, if anything, did you do when you saw Mr. Martinez?

A I gave him a high sign.

Q Did Mr. Martinez come over?

A Well, we met.

Q What did you say and what did he say?

A I said, "What was happening?"

He told me, "Be patient, everything was okay."

Q Was anybody present at that conversation besides the two of you? Was anybody else present?

A Just myself and Martinez.

Q After that conversation, where, if anyplace, did Mr. Martinez go?

A He went back to where he was standing and spoke with Mr. Rodriguez.

Q Where was Mr. Rodriguez?

A Mr. Rodriguez was on that corner, where that

1 jbesb Balmer-direct

2 bus stop was that I had been parking previously, which is
3 the northeast corner of Avenue B and 10th Street.

4 Q How long did they stay there?

5 A Few moments.

6 Q Was Mr. Algarin with them at that time?

7 A Yes, he was.

8 Q After those minutes passed, what happened?

9 A Mr. Martinez and Mr. Rodriguez and Mr. Algarin
10 all came in my direction and told me that everything --
11 everything was ready and told me -- and directed me into --

12 MR. SOLOMON: I would like to know who did the
13 telling.

14 Q Who said --

15 A Mr. Martinez said everything was ready and
16 directed me into 172, which is the social club that I spoke
17 of earlier, the Yabucoa. We went inside and to the rear
18 and the same place where I counted the money earlier that
19 day.

20 Q Who else entered the club besides yourself?

21 A It was Mr. Martinez, Mr. Rodriguez and there was
22 another person in the club that I had not seen before.

23 Q Could you describe him to the jury?

24 A The person I had not seen before?

25 Q Right.

1 jbesb Balmer-direct

2 A Yes. He was about 5 feet, between 5 feet 9,
3 5 feet 11, heavy built, black bushy-like Afro, curly. He
4 had on a grey coat, a light blue turtleneck sweater, a gold
5 medallion chain hanging around his neck with the crucifix
6 on it.

7 Q What, if anything, did he say?

8 A He came over to me with a large plastic bag
9 and he says -- he gave me the plastic bag. He said, "The
10 best heroin you ever had in your life. This is the best."

11 Q Who was present when he said that?

12 A Mr. Rodriguez and Mr. Martinez.

13 Q Did he give you the package?

14 A He gave me the package.

15 Q Where did you put it?

16 A I checked it out first and I saw -- he was
17 showing me the rocks that was in it and everything and
18 indicating that it was really great heroin. I then took
19 the bag and placed it under my belt.

20 After I placed it under my belt, I told him I
21 had to go to the trunk to get the money.

22 Q Who did you say that to?

23 A I said that to this unknown gentleman and Mr.
24 Martinez.

25 Q What happened when you said that?

1 jbesb Balmer-direct

2 A Mr. Rodriguez -- I began to walk out towards
3 the main entrance where we entered and Mr. Rodriguez put
4 his hands on my chest and sort of pushed me back and told
5 me I couldn't go back to the car.

6 Q Would you show the ladies and gentlemen of the
7 jury just what he did, using Mr. Sorkin as an example?

8 (Witness complies)

9 Q Now, you are Mr. Rodriguez and Mr. Sorkin is
10 you.

11 A And the area was a little -- about this, maybe
12 a little narrower than this, coming out of that rear part
13 of the club.

14 Q You are indicating an area of about three or
15 ten feet between counsel table and the prosecution table?

16 A That's correct. After I placed the money into
17 my belt -- the heroin into my belt, I am going down to the
18 trunk to get my money and as I am going this way, Mr.
19 Rodriguez says, "Hey, you are not going, you are not leaving
20 the club."

21 Q So if Mr. Sorkin is --

22 A He is me.

23 Q He is you, Detective Balmer, and you are
24 Rodriguez and Detective Balmer starts walking to you.

25 What did you do?

1 jbesb Rodriguez-direct

2 A To Investigator Don Clark.

3 Q Now, did there come a time after you read these
4 rights that you heard any of the defendants say anything
5 about those keys?

6 MR. SOLOMON: This is objected to.

7 THE COURT: This is after the rights are read.

8 MR. SOLOMON: Those keys. There is an
9 inference I don't like.

10 THE COURT: He said the keys he took away from
11 the gentleman.

12 MR. SOLOMON: From whom?

13 MR. SIFFERT: Martinez.

14 MR. SOLOMON: I withdraw the objection.

15 See, that's why I insist --

16 THE COURT: Just stop there.

17 Was anything said about the keys after you took
18 them from Martinez?

19 THE WITNESS: Yes, sir.

20 THE COURT: What was it?

21 THE WITNESS: The defendant Colon stated that
22 the keys belonged to him.

23 Q That is the defendant Colon Rodriguez?

24 A The defendant with the grey sport jacket. He
25 said that the keys were his and I asked him what the keys

jbesb

Rodriguez-direct/cross

were for and he says the keys were for a bar.

I asked him what a particular round key was for and he said it was for the jukebox. I asked him if he owned the bar and he told me he ran the bar. He said he ran it.

Q Did he give an address of the bar?

A I don't recollect.

MR. SIFFERT: The Government has no further questions of this witness.

THE COURT: Is there any cross-examination?

CROSS-EXAMINATION

BY MR. TABACOFF:

Q When was the first time that you saw Pedro Vazquez at Varick Street?

A The first time? It was close to ten o'clock.

Q And he wasn't present at the time the other defendants were arrested, was he?

A No, sir.

MR. TABACOFF: No further questions.

THE COURT: Any inquiry from Mr. Spitzer or MR. Solomon?

MR. SOLOMON: No cross, your Honor.

MR. SPITZER: No cross-examination.

THE COURT: Thank you very much. You may be

jbesb Balmer-cross

A There were several people present. I do not recall seeing Mr. Vazquez.

Q Did you ever apprehend the unknown individual?

A I never apprehended anyone.

Q Did anybody apprehend the unknown individual who supplied the heroin?

A I don't believe so.

MR. TABACOFF: I have no further questions of this witness.

THE COURT: Mr. Spitzer, have you any questions?

Mr. Solomon, have you any questions?

MR. SOLOMON: Two or three, very short.

CROSS-EXAMINATION

BY MR. SOLOMON:

Q In all your transactions to which you testified here yesterday and this morning on cross-examination, did you ever speak to the defendant Algarin?

A I was introduced to him.

Q I didn't ask you about that. Did you ever speak to him?

A I acknowledged the introduction that was made by Mr. Martinez to Mr. Algarin and he acknowledged me.

Q And that's all?

A That's it.

1 jbesb

Balmer-cross

2 Q You never discussed narcotics with him?

3 A No, I did not.

4 Q You never discussed the weather with him?

5 A No, I did not.

6 Q Isn't it right, you don't speak Spanish?

7 A I beg your pardon?

8 Q Do you speak Spanish?

9 A Well, not that well.

10 MR. SOLOMON: Thank you, sir.

11 THE COURT: Mr. Spitzer, any questions?

xxx

12 CROSS-EXAMINATION

13 BY MR. SPITZER:

14 Q When for the first time did you meet with Mr.
15 Rodriguez?

16 A On the street.

17 Q What time and what date?

18 A In and around -- well, it was April 28th, in
19 and around, say, 3:00 -- say 4:00 -- around 4:00, 4:15.

20 Q So about 4:15 on April 28th?

21 A That's correct.

22 Q Now, that is the very first time you ever met
23 Mr. Rodriguez, is that correct?

24 A That's correct.

25 Q With whom did you meet other than Mr. Rodriguez

1 jlesh Balmer-cross

2 at that time?

3 A When I met with Mr. Rodriguez?

4 Q Yes.

5 A Mr. Algarin was with him and Mr. Martinez.

6 Q Were you introduced to Mr. Rodriguez by anyone?

7 A Was I introduced?

8 Q At the time.

9 A There was never an introduction between any --
10 Mr. Martinez and myself.

11 Q I am talking about Mr. Rodriguez.

12 Who introduced you to Mr. Rodriguez, if anyone
13 did?

14 A Nobody introduced me to Mr. Rodriguez.

15 Q When for the first time did you learn his name?

16 A After he was arrested, I imagine.

17 Q Prior to that time, you never knew his name,
18 never were introduced to him?

19 A Never knew his name.

20 Q After you met him -- incidentally, where did you
21 meet him, at what corner?

22 A It wasn't on the corner.

23 Q Where did you meet him?

24 A I met him outside of 172 -- this is between 170
25 and 172 on Avenue B between 11th Street and 10th Street.

jbesb Balmer-cross

Q And that was right next to the Club Yabucoa?

A Well, that is the first time that we were together. I had seen him prior to us like meeting in a -- together.

Q You say you had seen him prior to that time?

A That's correct.

Q When did you see him prior to that time?

A I saw him on the corner of 10th Street and Avenue B, on the northeast corner on Avenue B, with Mr. Algarin and Mr. Martinez.

Q And you did not talk to him at that time? You did not talk to Mr. Martinez or Mr. Algarin at that time, did you?

A Well, I called to Mr. Martinez and we met.

Q That's it?

A And then Mr. Martinez went back to Mr. Rodriguez.

Q And after that, you again met him in front of 170 or 172 Avenue B, you say?

A You are correct.

Q At the Yabucoa Club?

A Yabucoa.

Q And that is the very first time that you actually met him personally?

A That's correct.

1 jbesb

Balmer-cross

2 Q Did you have a conversation with him?

3 A Yes.

4 Q Can you tell us what was said, what he said to
5 you and what you said to him?

6 A He did something to me. He put his hand on my
7 chest and pushed me.

8 Q That was the very first time that you had a
9 conversation with him?

10 A That's right.

11 Q He put his hands on your chest?

12 A Yes, he did.

13 Q Did he put both hands on your chest or one hand?

14 A One hand on my chest.

15 Q Do you recall making the statement in a report
16 of investigation, 3501, Subdivision (e), page 3, third line
17 from the bottom --

18 THE COURT: Show it to him.

19 Q Do you have a copy of that in front of you?

20 A No, I do not.

21 THE COURT: Show it to him.

22 MR. SIFFERT: At this time, may we have an
23 instruction from the Court as to the nature of the 3500
24 material?

25 THE COURT: Unnecessary.

1 jbesb Balmer-cross

2 Show him the statement. Show the witness the

3 statement. Give it to the clerk.

4 He wants to know if you recall making that

5 statement on that page.

6 THE WITNESS: Yes, I do.

7 Q Is that statement correct?

8 A There is an "s" on hands. There is an "s" on

9 the word "hands." I said, "Rodriguez had put his hands on

10 Detective Balmer's chest."

11 THE COURT: He wants to know is the statement

12 correct.

13 THE WITNESS: He put his hand on my chest.

14 THE COURT: What you are saying is he put one

15 hand on your chest --

16 THE WITNESS: And the other hand was clenched.

17 THE COURT: And the statement has "hand" in

18 plural, with an "s" on it?

19 THE WITNESS: That's correct.

20 THE COURT: But he put only one hand on you?

21 THE WITNESS: That's correct.

22 Q Now, in what part of the club was that hand

23 placed on your chest?

24 A In between the back room and the front entrance.

25 Q Was that at the doorway?

jlesb Balmer-cross

A At the doorway where you are leaving the back, there is a bar or pool table or whatever, something, that makes the -- makes like a small hall, like a small -- in other words, you can't use the whole room. There is an aisle.

Q And where were you facing at the time Mr. Rodriguez placed his hand on your chest?

A Facing the street, the front door.

Q And Mr. Rodriguez was facing the rear?

A That's correct.

Q Did Mr. Rodriguez have anything in his other hand at the time, if you recall?

A His hand was clenched. The other hand was clenched; clenched fist.

Q Clenched fist?

A Yes. So what he had in the hand I didn't see.

Q Is it possible Mr. Rodriguez had a bottle of beer in his hand at the time?

A No.

Q Did you at any time observe Mr. Rodriguez have a bottle of beer in his hand?

A At no time did he have a bottle of beer in his hand. At no time did he have a bottle of beer in his hand.

Q Isn't it a fact that as you were rushing out of

1 jbesb Klopfer-direct

2 between 10th and 11th Street, outside of a social club.

3 I don't recall the name of it.

4 Q Do you know the number?

5 A Of the social club?

6 Q Yes.

7 A No, I do not.

8 Q Did you have occasion to return to 201 Varick

9 Street?

10 A Yes, I did.

11 Q What floor did you go to?

12 A 11th floor.

13 Q On the 11th floor, did you see Rodriguez?

14 A Yes, I did.

15 Q Did you have a conversation with the defendant

16 Rodriguez?

17 A Yes, I did.

18 Q What did you say and what did he say?

19 A Well, I was making up or assisting in making

20 up property envelopes to put all their personal property

21 in and I had a set of keys that I was about to place in

22 Mr. Martinez's envelope and -- and Mr. Rodriguez told me

23 they were his keys and I said to him, "Mr. Martinez had

24 them," and he said, "They are my keys," and I said, "Okay."

25 He was behind me. So I turned around and I had

jbesb Klopfer-direct/cross
a conversation with Mr. Martinez, a short conversation, and
then I said to Mr. Rodriguez, "What are these keys for?"

He said, "My club."

I said, "What club is that?"

He said, "The River Bend."

I said, "Is it your club?"

And he told me yes, he owned the River Bend
Club and I put the keys, then, in his property envelope.

MR. SIFFERT: No further questions, your Honor.

THE COURT: Are there any questions?

MR. SOLOMON: No questions.

MR. TABACOFF: No questions.

THE COURT: Mr. Spitzer?

MR. SPITZER: Yes.

CROSS-EXAMINATION

BY MR. SPITZER:

Q Sergeant -- is it sergeant?

A Investigator.

Q Investigator Klopfer, you say that you observed
Martinez go up to the River Bend Social Club.

A River Bend Club.

Q Is that the name on the awning?

A I believe it is a blue awning with white
lettering.

jhesb Kilgallon-direct

1 A Yes, I did.

2 Q When was that?

3 A Approximately 4:15 p.m.

4 Q Where did you see him?

5 A I observed Mr. Vazquez -- excuse me, not
6 immediately. First I observed Mr. Martinez, Mr. Algarin
7 and Mr. Rodriguez standing on the corner of 10th Street
8 and Avenue B, right here.

9 Q Do you see Rodriguez in the courtroom today?

10 A Yes, I do.

11 Q Would you point him out to the jury?

12 A The gentleman in the blue shirt and blue pants.

13 MR. SIFFERT: May the record reflect the
14 identification of the defendant Rodriguez?

15 THE COURT: All right.

16 A At this time, about 4:15, as I said, I observed
17 Mr. Rodriguez, Mr. Algarin and Mr. Martinez standing on the
18 corner here. The next thing I seen was Mr. Vazquez walking
19 south on Avenue B and he joined the three, so for a very
20 brief time, I observed Mr. Vazquez, Mr. Algarin, Mr.
21 Martinez and Mr. Rodriguez standing on the corner.

22 Q Then what happened?

23 A The next thing I observed, Mr. Vazquez walked
24 north on Avenue B out of my view and Mr. Martinez crossed
25

1 ipesh

2 THE COURT: The defendant Rodriguez rests?

3 MR. SPITZER: He is ready to testify, your
4 Honor.

5 THE COURT: All right.

6 J O S E C O L O N R O D R I G U E Z, called
7 as a witness in his own behalf, being first duly
8 sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. SPITZER:

11 Q Mr. Rodriguez, where were you born?

12 A Excuse me?

13 Q Where were you born?

14 A In Puerto Rico.

15 Q When did you come to the United States?

16 A 1956.

17 Q When did you get married?

18 A 1958.

19 Q What were you doing when you came to the United
20 States, what kind of work were you doing?

21 A First I started working as a porter. I worked
22 as a porter for two years and then I got my hack license,
23 driver, and I drove a cab for twelve years in the City of
24 New York.

25 After that, I went to work with a company that

jpesb Rodriguez-direct

sells beverages, selling soft beverages, soft drinks.

After that, I went to work for Johns Bargain Store.

Q What were you doing at Johns Bargain Stores?

A I was a manager of the store.

Q What did you do after that?

A After that, I went to work for a company that sells groceries, wholesales it to grocery stores. I was a salesman.

Q How many years?

A About a year and a half.

Q After that, what did you do?

A After that, I went to work with this TT&S Bar and Grill, Incorporated.

Q What is the name used by the TT&S Bar and Grill, Incorporated?

A The River Bend Bar and Grill.

Q That's a bar, and how long have you worked there?

A Since 1972.

Q Are you the owner of the bar?

A Excuse me?

Q Are you the owner of the bar?

A No, I run the bar. I manage the bar.

1 jpesb Rodriguez-direct

2 Q Are there other employees in the bar other than
3 yourself?

4 A Yes, the rest are barmaids and the porter.

5 Q During this time, how long have you resided at
6 the FDR address?

7 A I have been living there since 1960.

8 Q Continuously?

9 A Continuously.

10 Q Have you lived there with your wife?

11 A My wife.

12 Q How many children?

13 A Three daughters.

14 Q How old are your daughters?

15 A One is 17, one is 13 and the other one is 7.

16 Q Do they go to school?

17 A Yes, they do.

18 Q What school do they go to?

19 A St. Bridgette's Catholic School.

20 Q What does your wife do?

21 A She's now unemployed. She used to be a
22 paraprofessional in that school and now is doing some
23 voluntary work in that school.

24 Q Is she getting paid for that work?

25 A No.

1 jpesb Rodriguez-direct

2 Q Prior to her being unemployed, was she being
3 paid as a paraprofessional?

4 A Yes, she was paid as a paraprofessional.

5 Q Now, have you ever been convicted of a crime?

6 A No, sir.

7 Q Have you ever been arrested?

8 A No, sir. This is the first time.

9 Q Has there ever been any trouble in your bar
10 since you started as manager?

11 A No, sir.

12 Q Is that bar opened when you're not there?

13 A It is opened when I'm not there.

14 Q And anybody can walk in, is that correct?

15 A That's right.

16 Q Now, could you tell us, if you you remember,
17 what happened on April 28, 1976?

18 A Well, on that day, I walked down the street
19 from my house and as a routine job, I go to the bar, check
20 everything, check the mail, come right back to the street
21 and as I was walking down the street, I went to the east
22 corner of Avenue D to mail my mail.

23 Q Avenue D and what street?

24 A Eighth Street. There's a mailbox there.

25 After that, I went to the restaurant. I came

1 jpesb Rodriguez-direct

2 back to the street again and I stood over there for awhile.
3 Then I met Medina or Martinez.

4 Q Where did you meet Martinez?

5 A He was walking down the street on Avenue D,
6 corner of 8th Street.

7 Q Did you know Martinez before that date?

8 A Oh, yes, I knew him before.

9 Q How did you come to know him?

10 A Well, he usually goes to the bar as a customer,
11 have drinks in there. He has been going to the bar very
12 often. He had been going there often. I had not seen him
13 for three months before that day.

14 Q In other words, before this date, you had not
15 seen him for three months?

16 A For three months I had not seen him but he used
17 to go to the bar.

18 Q Did you ask him where he was or what happened?

19 MR. SIFFERT: Objection; leading.

20 THE COURT: Overruled.

21 Q Did you ask him why and where he was?

22 A Yes, I asked him why, what happened he didn't
23 go to the bar any more as he used to do.

24 Q Continue, tell us what happened that day.

25 A So, then we walked back. I walked back to

jpesb Rodriguez-direct

9th Street and I stopped there for awhile and I continued walking to 10th Street. I walked to 10th Street and Avenue B.

On Avenue B and 10th Street, I stopped there for awhile and waited for a light and then I proceeded to walk toward 11th Street. It happened that I saw a guy that I know in front of this club. There was a bunch of people in there and the guy I know was in front of this club. I started to talk to him.

Q Which club are you talking about?

A The Yabucoa Club.

Q Go ahead.

I started talking to him in front of the club. I talked to him for awhile and then I entered the club. I had a beer. As I was buying the beer, this guy came out of the club from the back of the club, bumped into me and I said, "What's going on?"

He kept walking. I had my beer and I walked outside the club with my beer in my hands.

Q Who was this man who bumped into you?

A This man --

Q Did you see him today?

A Yes, I saw him today.

Q What's his name?

jpesb

Rodriguez-direct

1

2

A Detective Balmer.

3

Q Now, did you have occasion to see Alqarin that

4

day?

5

A Yes, I saw Alqarin.

6

Q Had you ever seen him before that day?

7

A No.

8

Q Did you ever know him?

9

A I had never met him before.

10

Q Did you have occasion to see Mr. Vazquez that

11

day?

12

A No, sir.

13

Q You never saw Mr. Vazquez?

14

A No.

15

16

17

(Continued on next page)

18

19

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1 jbesb Rodriguez-direct

2 Q Now, when you were arrested, who was arrested
3 with you?

4 A They arrested me, myself, in the middle of the
5 block on Avenue B, between 10th and 11th.

6 Q You were arrested by yourself?

7 A They arrest me there.

8 Q Was anybody else with you at the time that you
9 were arrested?

10 A No.

11 Q After they arrested you, did they take you to
12 a building on Varick Street?

13 A Yes.

14 Q Do you recall what happened at the building?

15 A No. In the building, they questioned me, they
16 took all my belongings, all my personal things, what I
17 had, and they got me in there for a while and then they came,
18 some of these guys, the detectives, got some questions, I
19 answered them. They took my fingerprints and they took
20 the photograph and everything and I stood there.

21 They allowed me a call and I stood there. They
22 took into the jail house.

23 Q Did there come a time while they were taking
24 your belongings that they took your car keys -- your keys
25 from your --

1 jbest - Rodriguez-direct

2 A Well, they took whatever I had on my pocket.

3 Q Well, the keys.

4 A Including the keys.

5 Q Were the keys in your possession when they took
6 them?

7 A I had them.

8 Q Were those keys ever in the possession of
9 Martinez?

10 A Not at all.

11 Q And you heard the officer testify before and
12 he testified that he was about to put your keys in an
13 envelope belonging to Martinez.

14 A I heard when he said so but I never met
15 Martinez after we were arrested until we were ready to go
16 to sleep.

17 Q That is the first time, that day after the arrest,
18 that you saw him?

19 A Yes, after the arrest.

20 Q Did you at any time ever give any set of keys
21 to the bar and grill to Martinez?

22 A No, sir.

23 Q Did you ever have a conversation with Det.
24 Balmer at any time?

25 A Not at all.

1 jbesb Rodriguez-cross

2 A Excuse me?

3 Q You saw Detective Angel Rodriguez testify?

4 A Yes, sir.

5 Q Was he in the car with you when you were in

6 handcuffs there?

7 A Yes, sir.

8 Q Did you ever say anything to Martinez while you

9 were in that car?

10 A Excuse me?

11 Q Did you say anything to Martinez when you were

12 in that car?

13 A Yes, sir.

14 Q What did you say to Martinez?

15 A I asked him what was going on.

16 Q What did he say?

17 A He said we were arrested.

18 Q Did you ever say, "I told you that black guy

19 was a shrimp"?

20 A No, sir.

21 Q Did you ever say that Balmer was a cop?

22 A No, sir.

23 Q "I told you so"?

24 A Excuse me?

25 Q You never said, "I told you so"?

ibesh Rodriguez-direct

Q What did you hear Algarin say to Martinez?

A He told him, "I hope they don't find the keys."

Q Did you hear the defendant Rodriguez say anything to Martinez?

A Yes, I did.

Q What did you hear him say?

A He said, "I told you the black guy was a shrimp."

Q What did you understand the word "shrimp" to mean?

MR. SPITZER: I object to it.

THE COURT: Sustained.

What does the word "shrimp" in arga mean? You know what arga means?

THE WITNESS: In street talk, it means a policeman or a cop, a police officer out of uniform.

MR. SIFFERT: I would ask for a limiting instruction that that goes only to Mr. Rodriguez's credibility.

THE COURT: Yes. This only has to do with the subject of Mr. Rodriguez's credibility and it has nothing at all to do with any other aspect of the case.

1 jbesb-13

2 defendants:

3 Title 21 of the United States Code, Section 841,
4 provides in pertinent part, "It shall be unlawfull for any
5 person knowingly or intentionally to distribute or possess
6 with intent to distribute a controlled substance."

7 The indictment charges all three defendants on
8 trial and Gerardo Martinez with the distribution or
9 possession with the intent to distribute the amount of heroin
10 that I mentioned. Before you can find any one of these
11 defendants guilty of the crime charged in this count of the
12 indictment, you must be convinced beyond a reasonable doubt
13 that the Government has proved each of the following
14 elements:

15 First, that on or about April 28, 1976, the
16 defendant you are considering did distribute or possess with
17 intent to distribute a narcotic drug controlled substance.

18 Second, that he did so unlawfully, willfully and
19 knowingly.

20 Third, that the substance charged to have been
21 distributed in the count is in fact a narcotic drug
22 controlled substance -- in this case, heroin.

23 I would like to say a few words on each of these
24 elements.

25 You will note that the first element of the

1 jbesb-14

2 offense is to distribute or possess with intent to distribute
3 the drug. What does that phrase mean?

4 I want to stress that it is sufficient if you
5 find beyond a reasonable doubt that the defendant you are
6 considering either distributed or possessed with intent to
7 distribute the narcotic drug.

8 The word "distribute" means the actual,
9 constructive or attempted transfer of the drug. The word
10 "possess" has its common everyday meaning -- that is, to
11 have something within your control, not necessarily in your
12 pocket or in your hand.

13 Possession may be of two types -- actual or
14 constructive. Actual possession means that a particular
15 person, a defendant, knowingly has personal, manual or
16 physical control of the drug, but constructive possession
17 means that although the drugs are in the physical
18 possession of another person, a defendant knowingly has the
19 power to exercise control over them or over their
20 distribution or to direct their movement or to cause their
21 delivery or aids and abets knowingly and intentionally in
22 respect thereof.

23 In other words, to possess something, you need
24 not have it in your hand or in your pocket, as I have said;
25 if it is within your power to exercise control over the

1 jbesb-15

2 drugs, you have possession of them.

3 Finally, the word "intent" refers to a person's
4 state of mind, so the term "possess with intent to
5 distribute" can be fairly stated to mean to control an item
6 with a state of mind or purpose to transfer or deliver that
7 item.

8 As to the second element, the term "unlawfully,
9 willfully and knowingly" means that you are to be satisfied
10 beyond a reasonable doubt that the defendant whom you are
11 considering knew what he was doing and that he acted
12 deliberately and voluntarily as opposed to mistakenly or
13 accidentally or as a result of some coercion. It is not
14 necessary he knew that he was violating any particular law.
15 It is sufficient if you are convinced beyond a reasonable
16 doubt that he was aware of the general unlawful nature of
17 his conduct.

18 Knowledge and intent exist in the mind. Since
19 it is not possible to look into a man's mind to see what
20 went on, the only way you have for arriving at a decision on
21 these questions is for you to take into consideration all
22 the facts and circumstances shown by the evidence, including
23 the exhibits, and to determine from all such facts and
24 circumstances whether the requisite knowledge and intent was
25 present at the time in question.

1 jbesb-16

2 Direct proof is unnecessary. In this connection,
3 the Government contends that the defendants attempted to
4 conceal their narcotics activities on April 28, 1976 by
5 hiding their narcotics activities, by concealing the
6 narcotics themselves and by guarding and camouflaging their
7 conversations and by being secretive in their actions.

8 If you find circumstances of intrigue or
9 deviousness or attempts by a defendant to conceal or be
10 secret about the true nature of the transaction, this may
11 be considered as circumstantial evidence of knowledge of
12 unlawful purpose.

13 As to the third essential element, the indictment
14 charges that the narcotic drug controlled substance is
15 heroin. I instruct you as a matter of law that heroin is a
16 narcotic controlled substance. You, however, must still
17 find beyond a reasonable doubt that the substance is heroin.
18 You may consider the stipulation as to the testimony of the
19 Government chemist in this regard who, it was stipulated, if
20 called, would testify that heroin was part of this April 28,
21 1976 happening.

22 Finally, it is not necessary for the Government
23 to show as to the charge you are considering that a defendant
24 physically committed the crime himself. The law provides
25 that a person who aids and abets another to commit an offense

1 jbesb-17

2 is just as guilty of that offense as if he committed it
3 himself.

4 In the context of this case, accordingly, you
5 may find a defendant guilty of the offense charged in the
6 count you are considering if you find beyond a reasonable
7 doubt that Gerardo Martinez or another defendant committed
8 the offense with which he is charged within the count and
9 that the defendant whom you are considering aided and
10 abetted the one who committed the offense.

11 To determine whether a defendant aided and
12 abetted the commission of the offense charged, you ask
13 yourselves these questions:

14 Did he knowingly and intentionally participate
15 in it as something he wished to bring about?

16 Did he associate himself with the venture?

17 Did he seek by his action to make it successful?

18 If he did, then you may find that he is an
19 aider and abettor and, therefore, guilty in that way.

20 The duty of imposing sentence rests exclusively
21 upon a judge. Your function is to weigh the evidence in the
22 case and to determine the guilt or innocence of the
23 defendant you are considering solely upon the basis of the
24 evidence and the law.

25 Under your oath as jurors, you cannot allow a

1 jbesb-18

2 consideration of the punishment which might be inflicted
3 upon a defendant if convicted to influence you in your
4 verdict in any way or in any sense enter into your
5 deliberations.

6 You are to decide upon the evidence and the
7 evidence alone and you must not be influenced by any
8 assumptions, conjectures or inferences not warranted by the
9 facts until proven to your satisfaction.

10 You must consider the guilt or innocence of
11 each defendant individually. Further, as you probably
12 already know, a verdict of guilty or not guilty on the
13 count on which you are reporting must be unanimous to be
14 acceptable.

15 The issues for you to decide relate to an
16 offense under the narcotics laws. We are not engaged in a
17 popularity contest. When you enter the jury box, you are
18 not expected to check your common sense outside. You should
19 use your common sense and general experience in evaluating
20 all the testimony and circumstances in evidence and not be
21 confined or confused or diverted from the task that you are
22 here to perform. The task is to find the facts.

23 Please do not communicate with anyone concerning
24 your deliberations in this case except in writing signed by
25 your spokesman, who will be Mrs. Lovaro, the lady who sits

1 jbesb-19

2 in the first seat. She will be provided with pencil and
3 paper.

4 I would now like to take a moment to talk to
5 the lawyers at the side bar. They may wish to call to my
6 attention any matter that I may have overlooked or where I
7 may have misspoken, and I will ask you to relax for a
8 moment while I do that.

9 (At the side bar)

10 MR. SOLOMON: I don't know whether you put
11 mere association because at certain points you dropped your
12 voice. If you didn't, I ask you to or mere association.

13 I put that in the conspiracy request but now
14 that the conspiracy is out, the request is withdrawn.

15 Outside of that, I have no objection.

16 MR. TABACOFF: No exceptions.

17 MR. SPITZER: No exceptions.

18 THE COURT: Any exceptions or objections to the
19 charge on the part of the Government?

20 MR. SIFFERT: Yesterday you said you would charge
21 on joint venture.

22 * THE COURT: I think I have sufficiently charged
23 on the subject as indicated.

24 (In the presence of the jury.)

25 THE COURT: I should like to add that mere

1 jbesb-20

2 association, without more, of any defendant with any other
3 defendant is not sufficient by itself to establish
4 membership in a joint enterprise. The Government must
5 establish beyond a reasonable doubt that the defendant whom
6 you are considering entered into the transaction in some
7 measure and in some part with a specific criminal intent --
8 that is, with a purpose to violate the law.

9 So, if a defendant with understanding of the
10 unlawful character of the alleged transaction intentionally
11 engages, advises or assists or aids and abets for the
12 purpose of furthering the illegal undertaking, he thereby
13 becomes a participant in the transaction.

14 Does that cover it, Mr. Solomon?

15 MR. SOLOMON: Yes, your Honor. Thank you.

16 THE COURT: I believe that that also covers the
17 Government's suggestion.

18 MR. SIFFERT: Thank you, your Honor.

19 THE COURT: Ladies and gentlemen, you may now
20 go out for your deliberations but first, Miss Mendel and
21 Miss Jenkins, we have now reached the conclusion of the
22 trial and as alternates, you are excused with the thanks of
23 the Court.

24 (One marshal duly sworn.)

25 THE COURT: All right, now you may leave.

DEFENDANT

JOS CALON RODRIGUEZ

THE SOUTHERN DISTRICT OF NEW YORK

DOCKET NO.

48 a
76 CR. 115

JUDGMENT AND PROBATION/COMMITMENT ORDER

AP 245 (8/74)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
Sept. 20, 1976

COUNSEL

☐ WITHOUT COUNSEL

However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

☒ WITH COUNSEL

Lester Yudenfriend

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

There being a ~~verdict~~ verdict of

☐ NOT GUILTY Defendant is discharged
☒ GUILTY on count 5.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug, controlled substance, to wit, heroin. (T. 21, U.S. Code, Sections 812, '41(a)(1) and 841(b)(1)(A) and T. 18, U.S. Code, Section 2.)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment ~~on~~ on count 5 for a term of ONE(1)YEAR, and on condition that defendant be confined in a JAIL TYPE institution for a period of THREE(3)MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on Probation for a period of THREE(3)YEARS, subject to the standing probation order of this Court. Title 18, Section 3651 U.S. Code.

SPECIAL CONDITIONS OF PROBATION

Pursuant to the provisions of Title 21, U.S. Code, Section 841, the defendant is placed on Special Parole for a period of THREE(3)YEARS to commence upon expiration of confinement. The Special Parole is to run CONCURRENTLY with the term of probation.

Defendant advised of his right to appeal.

Defendant is continued on present bail pending appeal.

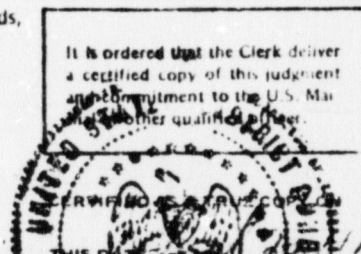
ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal for the Southern District of New York.



SIGNED BY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

| | | |
|---------------------------|---|------------------|
| UNITED STATES OF AMERICA, | : | |
| | : | NOTICE OF APPEAL |
| v. | : | |
| | : | 76 CR 445 |
| JOSE COLON RODRIGUEZ, | : | |
| Defendant. | : | |

-----x

Name and address of appellant, JOSE COLON RODRIGUEZ,
765 F.D.R. Drive, Apt. 13 G, New York, New York.

Name and address of appellant's attorney, LESTER
YUDENFRIEND, 295 Madison Avenue, New York, New York 10017.

Offense: On July 22, 1976, defendant was con-
victed of a violation of Title 21 of the United States Code
section 841 . On September 20, 1976, Mr. Justice Milton
Pollack, sentenced the defendant to
The defendant is now

I, the above named appellant, hereby appeal to
the United States Court of Appeals for the Second Circuit
from the above-stated judgment.

Dated: September 20, 1976

LESTER YUDENFRIEND
Attorney for the Defendant
JOSE COLON RODRIGUEZ
295 Madison Avenue
New York, N.Y. 10017
(212) 689-3161

